83-1506

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

W. J. TERRY, PETITIONER

v.

HANS BOTHKE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether a government employee's qualified immunity from a constitutional damages suit, alleging conduct that did not violate any clearly established constitutional right of the plaintiff, is abrogated because a court subsequently determines that certain administrative actions violated a provision of the Internal Revenue Code.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Fluor Engineers and Constructors, Inc.; Susan Meyers; and Michael Castrogiovani were named as appellees in the court of appeals.

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The Solicitor General, on behalf of W. J. Terry, a revenue officer of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals dated August 26, 1983 (App., *infra*, 1a-19a), is reported at 713 F.2d 1405. An earlier opinion of the court of appeals (App., *infra*, 20a-21a) is not yet reported. The opinion of the district court (App., *infra*, 22a-25a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 26a) was entered on August 26, 1983. A petition for rehearing was denied on November 16, 1983 (App., *infra*, 27a). By order dated February 2, 1984, Justice Rehnquist extended the time in which to file a petition

for a writ of certiorari to March 15, 1984. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Sections 6213 and 6331 of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)) are set forth in App., *infra*, 28a-30a.

STATEMENT

1. Respondent Hans Bothke filed a federal income tax form 1040 for 1977. The form contained only asterisks in place of figures to show respondent's income and tax. Respondent claimed a refund of all amounts withheld from his salary as shown on the accompanying W-2 form (App., *infra*, 31a-32a). Along with the 1040 form, respondent submitted a typewritten affidavit objecting to the treatment of his 1976 return, and six typewritten pages of "lengthy exegesis on why he had not provided the information" (App., *infra*, 2a, 22a-24a).

On March 5, 1979, the Internal Revenue Service (IRS) sent respondent a notice of correction of arithmetic pursuant to 26 U.S.C. 6213(b) on the ground that the return exhibited a mathematical or clerical error. The notice, sent from the IRS Center at Fresno, California, informed respondent that income taxes for 1977 in the amount of $6,177.87 had been assessed against him (App., *infra*, 2a-3a). The notice further informed respondent that if he believed the balance due was incorrect for reasons other than uncredited payments, he should return the notice with the correct payment and an explanation to account for the difference (*id.* at 16a).

Respondent replied to the notice on March 15, 1979, with a letter in which he asserted, among other things, that the notice was null and void because some of the figures showed no dollar sign, that his 1977 return and attachments thereto substantiated his position and furnished explanations why the balance due shown in the

notice was incorrect, and that the lack of a signature on the notice was a violation of his rights to equal protection and due process of law (App., *infra*, 33a-36a). A letter from the Fresno Center on May 2 told respondent that the claimed refund had been disallowed (App., *infra*, 3a). On June 6, 1979, the IRS Field Office in Santa Ana, California, sent respondent a notice of intent to levy on his salary or wages, informing him that he must pay the total amount due within 10 days to avoid such enforcement action (*ibid.*; 26 U.S.C. (& Supp. V) 6331(a)).

Pursuant to 26 U.S.C. 6213(b)(1), following the issuance of a notice of correction of arithmetic and a 10-day notice of intent to levy (26 U.S.C. 6331(a)), the IRS may levy upon a taxpayer's wages without serving a notice of deficiency under the provisions of 26 U.S.C. (& Supp. V) 6212, 6213(a).[1] However, if within 60 days the taxpayer requests an abatement of any assessment specified in a notice of correction of arithmetic, the regular provisions of the Code come into play and a levy can only be imposed following deficiency proceedings. 26 U.S.C. 6213(b)(2)(A). Respondent's March 15 letter in response to the notice of correction of arithmetic was not construed by IRS employees at the Fresno Center as a request for an abatement.

On August 3, 1979, at the Santa Ana Field Office, respondent's case was turned over to petitioner, Revenue Officer Wendy J. Terry, who received a tax delinquent account showing respondent's assessed 1977 tax liability. Petitioner's duty was to investigate and collect the delinquent account (App., *infra*, 3a). On November 21, 1979, petitioner contacted respondent by telephone and demanded payment of the taxes. Respondent, protesting that the IRS had violated his rights, refused

[1] A notice of deficiency gives the taxpayer 90 days to petition the Tax Court to review the asserted deficiency. 26 U.S.C. (Supp. V) 6213(a).

payment. After ascertaining that a notice of intent to levy had been sent to respondent, petitioner served a levy of wages and salary on respondent's employer, which was thereafter executed in the amount of $3,415.43 on December 3, 1979 (*id.* at 4a).

In response, respondent resigned his employment (allegedly to prevent further levies), filed an amended return seeking a refund of the amount collected by the levy, and instituted this pro se lawsuit (App., *infra*, 4a). Respondent asserted that petitioner's failure to provide a notice of deficiency under 26 U.S.C. (& Supp. V) 6213 prior to the assessment and levy deprived him of his "rights, privileges and immunities guaranteed under the federal Constitution, and constitute an action in bad faith, bad motive not authorized by law" (Complaint at 8). Petitioner sought $100,000 in compensatory and $150,000 in punitive damages from petitioner (*id.* at 14).[2]

2. On motion for summary judgment, the district court held for petitioner, concluding that she was entitled to official immunity from suit (App., *infra*, 22a-25a).[3] The court of appeals, after first issuing a memorandum opinion affirming the district court,[4] re-

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[2] Fluor Engineers and Constructors, Inc. (respondent's employer), Susan Meyers (Fluor's attorney) and Michael Castrogiovani (head of Fluor's corporate payroll department) were also named as defendants by respondent, but were dismissed as parties soon after the filing of the suit (App., *infra*, 5a).

[3] The district court found that petitioner was either entitled to qualified immunity because her actions were taken in good faith, or to absolute immunity because she was "'responsible for the decision to initiate or continue a proceeding subject to agency adjudication'" (App., *infra*, 24a (quoting *Butz* v. *Economou*, 438 U.S. 478, 516 (1978)).

[4] In its first opinion (App., *infra*, 20a-21a), the court of appeals concluded that petitioner was immune from liability under its prior decision in *Stankevitz* v. *IRS*, 640 F.2d 205, 206 (9th Cir. 1981), which accords absolute quasi-prosecutorial immunity

versed (*id.* at 1a-19a). The court concluded that petitioner was not entitled to absolute immunity from suit,[5] and was also likely to be ineligible for the more limited shield of qualified immunity (*id.* at 14a-18a). Quoting this Court's recent decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), the court of appeals stated that public officials are not entitled to qualified immunity from a constitutional damages action if they violate "'clearly established statutory or constitutional rights'" (App., *infra*, 15a (emphasis omitted)). The court concluded that respondent's "statutory" rights had been violated by the IRS in this case because his March 15 letter replying to the notice of correction of arithmetic should have been "construed" as a request for an abatement of the assessment, thereby triggering the deficiency procedures of the Internal Revenue Code prior to the levy on his wages (*id.* at

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to officials who initiate or continue a proceeding subject to agency adjudication. The court further agreed that, in any event, petitioner was shielded by the doctrine of qualified immunity because her actions were taken in good faith and were within the scope of her authority (App., *infra*, 21a).

[5] The court limited its prior holding in *Stankevitz* v. *IRS*, *supra*, to those situations where the actions taken by the government official are reviewable by an impartial decisionmaker in a proceeding closely analogous to a judge-supervised trial. Because respondent did not receive a notice of deficiency entitling him to petition the Tax Court in this case, the court concluded that petitioner's collection activities were not reviewable in a manner that warranted application of absolute immunity (App., *infra*, 7a-11a). The court also rejected the argument that revenue officers are entitled to absolute immunity based upon the sensitivity of their collection activities and their concomitant vulnerability to retributive litigation (*id.* at 11a-14a). We do not seek review of that holding here.

15a-16a).[6] The court accordingly remanded the case for a determination whether petitioner knew of respondent's reply to the notice of correction of arithmetic, noting that if she "had this protest or was aware of its substance, it is questionable whether she can meet the objective good faith standard" of *Harlow* (*id.* at 17a (footnote omitted)).[7]

REASONS FOR GRANTING THE PETITION

This case raises an important issue regarding the proper scope of official qualified immunity, one that is currently pending before the Court in *Davis* v. *Scherer*, No. 83-490: whether the violation of a statute or administrative regulation abrogates a government official's immunity to a suit claiming damages for a *constitutional* violation.[8] Like the lower courts' decisions in *Davis*, the court of appeals' construction of the objective qualified immunity test recently set forth by this Court in *Harlow* v. *Fitzgerald*, *supra*, is erroneous, and will have a significant adverse impact upon the performance of official duties by government officers.

1. Contrary to the court of appeals' apparent assumption, violation of a "statutory" right is not sufficient to abrogate an official's immunity to a constitutional damages action. As we explained in our Amicus Brief in *Davis* (at 8-23), violation of "clearly established

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[6] Although respondent's March 15 letter replying to the notice of correction of arithmetic did not explicitly request an abatement of the assessment set forth in the notice, the letter did state that the 1977 return and attachments "furnish explanations * * * why the alleged balance due I.R.S. is incorrect" (App., *infra*, 34a). The court of appeals construed this passage as a request for an abatement (*id.* at 16a).

[7] The court did not disturb the district court's finding that petitioner had acted in subjective good faith (App., *infra*, 17a n.5).

[8] We are serving respondent with a copy of our Amicus Brief in No. 83-490.

statutory * * * rights" (*Harlow*, 457 U.S. at 818) is relevant to a public official's immunity defense only where, as in *Harlow* (457 U.S. at 805, 811 n.16, 820 n.36), and as may occur with some frequency under 42 U.S.C. (Supp. V) 1983 (*Maine* v. *Thiboutot*, 448 U.S. 1 (1980)), the plaintiff is pressing a statutory cause of action. Where the plaintiff seeks damages for violation of his constitutional rights, a defendant public official is entitled to qualified immunity unless he violates the "clearly established" *constitutional* rights of the plaintiff. See, *e.g.*, *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978). Because petitioner did not violate any clearly established constitutional right of the respondent,[9] she is immune from a suit proceeding on constitutional grounds.[10]

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[9] Respondent plainly was not denied any "clearly established" due process right. There are, as far as we can ascertain, no cases holding that the violation of a taxpayer's right to abatement under 26 U.S.C. 6213(b)(2) constitutes a denial of due process. Indeed, prior to the enactment of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 *et seq.*, a taxpayer did not even have a statutory right to claim abatement of any income tax assessment when a notice of a mathematical error was sent to him. Under the prior statutory provisions, the taxpayer was permitted by the IRS to explain why he believed there was no mathematical error, and the assessment was, in the discretion of the Service, abated if the explanation had merit. Staff of the Joint Comm. on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 372 (1976), *reprinted in* 1976-3 Cum. Bull. (Vol. 2) 1, 384; H.R. Rep. 94-658, 94th Cong., 1st Sess. 289-290 (1975); S. Rep. 94-938, 94th Cong., 2d Sess. 375 (1976). No cases decided prior to the enactment of 26 U.S.C. 6213(b)(2) suggested that this procedure was in any way unconstitutional. Cf. *Phillips* v. *Commissioner*, 283 U.S. 589 (1931).

[10] To the extent that the court of appeals' decision can be read as suggesting that the mere violation of a provision of the Internal Revenue Code gives a taxpayer a statutory damages action

2. The decision of the court of appeals will constitute a huge escalation of the risk of ruinous personal liability run by Internal Revenue Officers, and will inevitably cast a chilling pall on their ability zealously to perform their duties. Under *Harlow*, government employees could assume that they were immune from personal constitutional damages liability arising out of the performance of their official duties so long as they were careful to comply with clearly established constitutional norms. The decision below, however, suggests that IRS employees may be forced to litigate a constitutional damages suit any time a court concludes, long after the fact, that notwithstanding their subjective good faith (App., *infra*, 17a n.5) their conduct (or actions taken by their co-workers) did not comply with all the complexities of the Internal Revenue Code. The decision, in effect, transforms the Code and its implementing regulations into a mine field in which IRS employees labor at their own risk. Cf. *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

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against an erring IRS official (see App., *infra*, 18a-19a n.7), the decision flies in the face of this Court's precedents controlling the creation of implied statutory damages actions. See, *e.g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 19-21 (1981). Congress has narrowly limited its express statutory authorization for damages claims against IRS officials. See 26 U.S.C. 7214(a). The legislative history of 26 U.S.C. 6213(b)(2), moreover, makes it quite clear that Congress did not affirmatively intend to create an implied damages remedy for the enforcement of the taxpayer's right to abatement. Staff of the Joint Comm. on Taxation, *supra*, at 372; H.R. Rep. 94-658, *supra*, at 289-290; S. Rep. 94-938, *supra*, at 375. See generally *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 377-378 (1982).

In any event, the statutory violation cited by the court of appeals occurred at the Fresno Service Center—prior to the date that respondent's collection account was assigned to petitioner. It is, therefore, quite unclear why the statutory violation could justify a damages claim against petitioner.

Abrogation of official immunity on the basis of non-constitutional violations of statutory (and, perhaps, administrative) regulations could well paralyze the tax collection arm of the Internal Revenue Service. The Internal Revenue Code is replete with complex technical provisions. Their good-faith interpretation and application can lead to what a court, later, will nevertheless conclude to be some variety of procedurally irregular assessment or collection of tax. IRS employees are given specialized training to deal with the complexities of the Code provisions that they are required to administer, but, like other individuals who perform highly technical tasks, they are capable of error. The decision of the court below, which dissolves the shield of official immunity any time a tax assessment or levy turns out to be procedurally vulnerable, will unjustifiably chill the vigorous enforcement of the nation's revenue laws. IRS employees like petitioner will henceforth think twice before taking any action that might anger a potential plaintiff. The reins of the qualified immunity doctrine should not be so tightly drawn. As the Court noted in *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974), the doctrine of qualified immunity assumes that officials may err, but nevertheless recognizes that "it is better to risk some error and possible injury from such error than not to decide or act at all." See also *Wood* v. *Strickland*, 420 U.S. at 319-320.

The decision in this case poses special problems because of the encouragement that it gives to members of the tax protest movement in this county. Many of these individuals target front-line IRS employees, such as revenue officers, for vexatious damages suits.[11] The

[11] We are advised that, as of mid-1983, there were 547 constitutional damages actions pending against 1,360 employees of the IRS. A sizeable number of these suits were brought by tax protesters. The government currently expends significant resources and staff hours defending such actions.

constitutional claims raised in these suits are almost always rejected by the courts, and the doctrine of qualified official immunity has been—to this point—an effective means of disposing of frivolous actions without the necessity of trial. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. at 817-818 (newly formulated objective qualified immunity test is designed to prevent public officials from being unnecessarily subjected "either to the costs of trial or to the burdens of broad-reaching discovery").[12] But, under the approach of the court of appeals, tax protesters will be able to avoid dismissal of their suits on immunity grounds any time they can locate in their files a paper misstep that results in a violation of any provision of the Internal Revenue Code. Because of the complexity of the Code—and the prolixity of most taxpayers in respondent's position[13]—the decision below creates a host of possibilities for vexation and harassment of public officials by litigious citizens eager to seize on any means to delay the disposition of otherwise meritless constitutional damages actions. Such a result will disrupt the carrying out of public responsibilities and will deter able persons from entering upon a career in the public service.

The Court reformulated the doctrine of qualified immunity in *Harlow* to prevent undue "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from

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[12] The personal burdens attending the defense of a constitutional damages action can be substantial. Even should a defendant ultimately prevail on the merits of a constitutional claim, his credit may be adversely affected for months or years by the appearance of the case on the lis pendens docket. In this case, for example, petitioner has had to live with a potential liability of $250,000 for over four years.

[13] The portion of respondent's March 15 letter that the court of appeals construed as a request for an abatement was buried in the middle of a rambling communication that began and ended with a host of frivolous legal arguments (App., *infra*, 33a-36a).

public service" (457 U.S. at 816). The court below has fortified the very evils *Harlow* was designed to dispel. For the reasons articulated in our Amicus Brief in *Davis*, the violation of a statutory provision should not lead to abrogation of a public official's qualified immunity to a constitutional damages action, and the court of appeals' contrary conclusion in this case should be disapproved.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Davis* v. *Scherer*, No. 83-490 and then disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5457
DC# CV 80-4450-MML

HANS BOTHKE, PLAINTIFF, APPELLANT,

v.

FLOUR ENGINEERS AND CONSTRUCTORS, INC., ET AL., DEFENDANTS,

and

W. J. TERRY, DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Central District of California
District Judge Malcolm M. Lucas, Presiding
[Argued and Submitted December 10, 1982]
[Decided January 24, 1983]
[Filed Aug. 26, 1983]

OPINION

Before: WRIGHT, KENNEDY, and BOOCHEVER, Circuit Judges.

WRIGHT, Circuit Judge:

Bothke, a pro se litigant, appeals from an adverse summary judgment in his suit for damages against an Internal Revenue Service official for claimed constitutional violations in the allegedly wrongful levy of his wages. The district court held that the IRS official was absolutely immune or, alternatively, was protected by qualified immunity because she acted in good faith and

within the scope of her authority. This panel affirmed in a memorandum disposition.

The case is now before us on petition for rehearing. Because there seems to be some uncertainty in this circuit over the type of immunity to which IRS agents are entitled, a fuller treatment of the matter is required. We construe Bothke's petition for rehearing as one for reconsideration, which is granted. The memorandum disposition of January 24, 1983 is withdrawn.

FACTS

Plaintiff-appellant Bothke filed a timely but unusual income tax return for 1977. On several lines he entered asterisks in lieu of dollar amounts. Under the amount to be refunded, he entered $1154.62, an amount corresponding to taxes his employer had withheld from his salary as shown on the W-2 form accompanying the return.

The asterisks were referenced to a lengthy exegesis on why he had not provided the information. The substance was that Bothke felt the IRS had mistreated him over his 1976 return by ignoring the figures he provided, by failing to help resolve questions about the return, and by assessing a deficiency before according him the prior administrative hearing its literature allegedly indicated he was entitled to. It went on to state that he had concluded the IRS had acted in bad faith and deprived him of due process and, to protect his constitutional rights, on this return he was exercising his First, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Amendment rights not to provide the information.

The IRS center at Fresno reviewed Bothke's return. On March 5, 1979, it sent him a notice of "Correction to Arithmetic" indicating that "based on the information received" the IRS had adjusted tax due on the return from zero to $6755.80, which, after subtracting withholdings and adding penalty and interest, left a balance

due of $6177.87. Bothke responded on March 15 with an objection to the notice on numerous grounds.

On May 2, a letter from the director of the Fresno IRS center told Bothke that the refund claimed on his tax return had been disallowed. This document is not in the appellate record, but it apparently referred to alleged claims by Bothke that the tax laws were unconstitutional.

On June 6, the manager of the tax control unit in Santa Ana sent another letter stating that although notices and demands had been made for payment of Bothke's 1977 taxes, no money had been received. It warned that unless within ten days the IRS received the amount due or heard from the taxpayer, his wages could be levied and his property seized. Eight days after the ten-day notice, Bothke wrote to the Fresno center objecting to both documents and denying he had challenged the constitutionality of the tax laws.

Bothke's case was later turned over to the field office at which defendant Terry worked. On August 3, 1979, Terry was given Bothke's Tax Delinquent Account (TDA). Her assigned duties were to investigate and collect delinquent accounts.

The TDA, a one-page agency form, had six printed lines to show some of the history of the case. The file did not contain a copy of Bothke's tax return. It is unclear what other documents, if any, were in the file sent to the field office.

Terry twice submitted a "Recommendation for Nonfiling of Notice of Tax Lien" noting, "Because of sensitivity of case, it is in best interest not to file F[ederal] T[ax] L[ien] until extensive research completed on T[ax] P[ayer] claims." During the litigation she stated that by "sensitivity" she was referring to the volume of correspondence the IRS had received from Bothke.

She made several requests to the Fresno IRS Center for a copy of Bothke's return. Her handwritten nota-

tions on the "TDA History Record" said, "Wanted to have a copy before seeing T[ax] P[ayer] because of delicacy [blank] of situation."

When no copy of the tax return arrived after some time, she elected to proceed without it. She visited Bothke's home on November 21, 1979 and, in his absence, left instructions for him to call. He did so, again protesting that the IRS had violated his rights. Terry told him that the tax must be paid and that the IRS would communicate with him.

On November 26, 1979, Terry served on his employer a levy of Bothke's wages. On November 29, she received a protest from Bothke by certified mail. He also made a written protest to his employer. The levy of $3,415.43 was executed several days later.

Bothke resigned from his job to prevent the further attachment of his wages. He then filed an amended return for 1977, using dollar amounts instead of asterisks. It indicated that a refund was due from the amounts withheld and levied. When Bothke sued another IRS agent regarding levy of other property, the Service elected as a policy matter to abate any then-existing assessment and release any liens with respect to his 1977 taxes.

He brought this suit in federal district court against his employer, the assistant legal counsel for his employer who had accepted the levy, and IRS agent Terry. He alleged violations of his constitutional rights and sought compensatory and punitive damages.[1]

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[1] After reviewing the record and listening to Bothke's oral argument, we are satisfied that this lawsuit and his misguided, unorthodox 1977 tax return were not frivolous attempts solely to challenge or burden the tax system or harrass its agents. Rather, his predominant theme has been that this country's laws are just and that government agents must conform to them, a matter of importance to him as an immigrant who has lived under totalitarian regimes in Eastern Europe.

The first two defendants were dismissed early from the case. On the magistrate's recommendation, the trial judge rendered summary judgment for defendant Terry, on the ground that she was either absolutely or qualifiedly immune, and dismissed the action.

I. ABSOLUTE IMMUNITY

Executive officials have long enjoyed some form of immunity for acts performed in the course of their official duties. The underlying rationales are (1) the injustice of imposing personal liability on one whose public office obliges the exercise of discretion and (2) the danger that potential liability will compromise the forthright performance of official duties. *See, e.g., Scheuer* v. *Rhodes*, 416 U.S. 232, 239-40 (1974).

The rules governing official immunity are largely of judicial making and have changed considerably over the years. Earlier cases wrestled with the issue with varying results. *See id.* at 241. In some instances courts did not foreclose recovery on immunity grounds, *see, e.g., Bates* v. *Clark*, 95 U.S. 204 (1877), and were reluctant to formulate a rule that would do so irrespective of the circumstances, *see O'Campo* v. *Hardisty*, 262 F.2d 621, 625 (9th Cir. 1958).

Eventually, executive officials performing discretionary functions were protected from damage suits by absolute official immunity, if they had acted within the "outer perimeter" of their duties. *E.g., Barr* v. *Mateo*, 360 U.S. 564, 575 (1959) (opinion of Harlan, J.).

Bothke emphasized below that he was suing agent Terry individually for allegedly acting in violation of legal duties and was not suing the United States. At a hearing the magistrate rejected Terry's sovereign immunity defense, and correctly so. Defendant's argument, that the suit was really against the government because 26 U.S.C. § 7423 authorizes reimbursement of IRS agents for all damages recovered from them for acts done in performance of official duties, was specious. *Cf. also United States* v. *Nunnally Investment Co.*, 316 U.S. 258, 260 (1942).

This general rule was applied to IRS agents. *Sowders* v. *Damron*, 457 F.2d 1182, 1184 (10th Cir. 1972); *Bridges* v. *IRS*, 433 F.2d 299, 300 (5th Cir. 1970); *David* v. *Cohen*, 407 F.2d 1268, 1271-72 & n.2 (D.C. Cir. 1969); *Bershad* v. *Wood*, 290 F.2d 714, 716, 719 (9th Cir. 1961).

A major change occurred when the Supreme Court concluded that absolute immunity was inappropriate for state executive officials sued under 42 U.S.C. § 1983 for violating federal rights. *Scheuer* v. *Rhodes*, 416 U.S. 232, 238-49 (1974). The Court recognized that Congress had not intended to abrogate entirely the immunity accorded some officials by common law. *Id.* at 243. While judges and legislators acting within their traditional roles continued to enjoy absolute immunity, *id.* at 243-44, state executive officials would have only qualified immunity. *Id.* at 247-48.

The Court left the immunity question for federal officials to the courts of appeals when it acknowledged a damages remedy against those persons in suits for federal constitutional violations. *Bivens* v. *Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388, 390-98 (1971). This circuit reasoned that immunity accorded federal officials in *Bivens* actions should be no greater than that accorded state officials under section 1983 for identical violations. *Mark* v. *Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975).

Quoting *Mark* v. *Groff*, the Supreme Court agreed with this court and most circuits, which had reached similar conclusions. *Butz* v. *Economou*, 438 U.S. 478, 486 & n.9, 498-500, 505-07 (1978). A different holding would "stand the constitutional scheme on its head." *Id.* at 504. Qualified immunity for federal executive officials struck a balance between the interests underlying immunity and the need for a remedy for constitutional violations. *Id.* at 497, 504-06.

Significantly for our purposes here, *Mark* v. *Groff* was a suit against IRS officials, as were three of the other circuit cases cited and followed in *Butz*. *See Weir* v. *Muller*, 527 F.2d 872, 874 n.1 (5th Cir. 1976)[2]; *Black* v. *United States*, 534 F.2d 524, 527 (2d Cir. 1976); *G.M. Leasing Corp.* v. *United States*, 560 F.2d 1011, 1015 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

The Supreme Court seemingly accepted no more than qualified immunity for IRS officials in the remand that preceded the last-mentioned case. *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 360 (1977). The Fourth Circuit also had selected the qualified immunity standard for IRS officials. *White* v. *Boyle*, 538 F.2d 1077, 1080 (4th Cir. 1976).

After *Butz*, circuit cases have continued to apply the qualified immunity standard to tax officials sued for constitutional torts. *See Hall* v. *United States*, 704 F.2d 246, 249, 250 & n.2 (6th Cir. 1983) (levy without statutory deficiency notice); *Granger* v. *Marek*, 583 F.2d 781, 784 (6th Cir. 1978).

Cases in this circuit also have applied that standard. *Hutchinson* v. *United States*, 677 F.2d 1322, 1328 (9th Cir. 1982) (qualified immunity for activities including levies); *Miller* v. *DeLaune*, 602 F.2d 198, 199 (9th Cir. 1979).

Apparently the only exception was a brief per curiam opinion in this circuit, *Stankevitz* v. *IRS*, 640 F.2d 205 (9th Cir. 1981),[3] the case relied on by the court below in

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[2] The Fifth Circuit's attempt to overrule this case insofar as it may have implied a right of action under the due process clause of the Fifth Amendment was reversed by the Supreme Court. *Davis* v. *Passman*, 571 F.2d 793, 801 (5th Cir.1978), *reversed*, 442 U.S. 228 (1979).

[3] One other Ninth Circuit case, in a footnote, cited *Bershad* v. *Wood* as an example of a case granting absolute quasi-judicial immunity to some officials other than judges. *Pomerantz* v. *County of Los Angeles*, 674 F.2d 1288, 1291 n.1 (9th Cir. 1982).

holding Terry absolutely immune. *Stankevitz* accorded absolute immunity to IRS officials who audited the plaintiff's tax return and assessed a deficiency.

In so doing, the opinion followed another part of *Butz*, which stated that executive officials have absolute immunity if, in an administrative proceeding, they assume a role analogous to that of a judge or prosecutor in a traditional trial setting. 438 U.S. at 508-17. Quoting *Butz*, *Stankevitz* accorded the IRS defendants absolute immunity because they were "'responsible for the decision to initiate or continue a proceeding subject to agency adjudication.'" 640 F.2d at 206 (quoting 438 U.S. at 516).

Taken out of context, this line quoted from *Butz* might easily be read to imply a broader spectrum of immunity than the Supreme Court intended. In using the term "proceeding subject to agency adjudication," *Butz* was not referring broadly to an official's exercise of judgment in the course of agency action directed at a private person. "Adjudication" was a technical term for a quasi-judicial, formal, on-the-record proceeding under the Administrative Procedure Act. *See* 5 U.S.C. §§ 554-557.

The immunity in *Bershad* was not quasi-judicial, but the then-existing absolute official immunity for executive officers. The *Pomerantz* court did not discuss the intervening changes in the law wrought by *Scheuer* v. *Rhodes*, *Butz*, *Mark* v. *Groff*, and related cases. We do not, however, criticize the holding in *Pomerantz* that jury administrators rendering decisions as to eligibility of prospective jurors were cloaked with quasi-judicial immunity.

A comparable oversight occurred with regard to the current scope of executive immunity in general in a criminal case against an executive official adverting to civil liability by way of analogy. *See Clifton* v. *Cox*, 549 F.2d 722, 726 (9th Cir. 1977) ("It is well-settled that a federal official cannot be held personally liable in a civil suit for acts committed within the outer perimeter of his line of duty").

The quasi-judicial absolute immunity *Butz* accorded certain executive officials was predicated on the close similarity of this formal agency adjudication to a traditional courtroom trial. The Supreme Court recently reemphasized that absolute immunity for participants in judicial proceedings "stem[s] 'from the characteristics of the judicial process.'" *Briscoe* v. *LaHue*, 51 U.S.L.W. 4247, 4249 (U.S. Mar. 7, 1983) (No. 81-1404) (quoting *Butz*, 438 U.S. at 512). *See also Sellars* v. *Procunier*, 641 F.2d 1295, 1298-1300 & nn.6-9 (9th Cir.), *cert. denied*, 454 U.S. 1101 (1981).

Formal administrative adjudication shares with judge-supervised trials two key qualities that diminish the need for individual suits to correct constitutional transgressions: (1) the impartiality of the decision maker and (2) the reliability of the information forming the basis of the decision. *See Butz*, 438 U.S. at 512-13. Safeguards inherent in both forums foster these qualities.

The first quality is fostered in formal agency adjudication by the checks and balances afforded when a different person assumes the roles comparable to those of prosecutor and judge, with the adjudicator independent of agency control. Hearing examiners are neither required to perform prosecutorial and investigative functions inconsistent with their judicial role nor to answer to those who do. *Id.* at 513-14. This unbiased adjudicator provides a check on agency zeal. *Id.* at 515. One group of quasi-prosecutorial agency officials immunized in *Butz* were those who brought a proceeding to *seek* sanctions. *Id.* at 515. They did not *impose* the sanctions.

The second quality is fostered by having the transcript and exhibits of oral and documentary evidence constitute the exclusive record on which the decision must be based. The decision maker must explain the decision with findings and conclusions. An adversarial

procedure allows cross-examination of witnesses, a challenge to the government's theories, and the sobering requirement of airing these theories in a public forum. *Id.* at 512-13, 517.

The disinterested examiner may accept or reject the government's theories, after hearing both sides and all relevant evidence. *Id.* at 517. The other agency "prosecutorial" personnel granted absolute immunity in *Butz* were those who present evidence in an agency hearing, the purpose being to encourage the fullest possible presentation of evidence to the decision maker. *See id.*

These two qualities are conspicuously absent from Terry's activities, as they will typically be from an agency "proceeding" in the broad sense that is not subject to the safeguards of formal adjudication. First, Terry was not, nor was she restrained by, an adjudicator independent of agency control and of a conflicting prosecutorial role. The role she played, if analogized to a traditional trial, was an amalgam of the roles of prosecutor, judge, jury, and marshal executing the judgment as well, as her duties included agency investigation and enforcement, judgmental functions, assessment of information, and execution of the levy. Second, the intra-agency file forwarded to her as a basis for her decision bears little resemblance to the complete and reliable record created and tested by the adversarial process in a trial or formal agency hearing.

IRS defendants performing functions the *Stankevitz* defendants did may legitimately be covered by the executive-branch analog to prosecutors' quasi-judicial immunity as outlined in *Butz*, 438 U.S. at 515-17. Their actions triggered the deficiency proceeding with its procedural safeguards, including preseizure, preassessment notice and an opportunity for the taxpayer to take his case to the impartial forum of the Tax Court.

In contrast, Bothke's complaint is that statutorily prescribed safeguards were circumvented in his case in

disregard of his vigorous protests at every stage. The IRS sent him no deficiency notice, a jurisdictional prerequisite for a petition to the Tax Court, and provided no impartial, formal agency hearing.

Stankevitz ruled that the proper forum for taxpayer complaints of unfair treatment is in a subsequent enforcement proceeding by the agency. 640 F.2d at 206. This rule cannot apply when the agency has bypassed the "proceeding" and gone precipitously to enforcement.

Qualified immunity for federal executive officials is the general rule and absolute immunity the exceptional case, a proposition first voiced in *Butz*, 438 U.S. at 506-08, and recently reiterated in *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727, 2736 (1982). Were we to accord absolute immunity to defendant Terry under the guise of applying *Butz*, its carefully delineated exception would overwhelm the rule set forth in that case.

That IRS agents performing specific tasks had absolute immunity in *Stankevitz* does not mean that all IRS agents are also absolutely immune irrespective of what tasks they perform. There is no such blanket immunity for an arm of government.

The immunity available depends not on an official's job title or agency, but on the function that person was performing when taking the actions that provoked the lawsuit. *See, e.g., Richardson* v. *Koshiba*, 693 F.2d 911, 913-14 (9th Cir. 1982) (even judicial personnel are not absolutely immune when performing executive functions); *Harlow*, 102 S. Ct. at 2735. *See also Scheuer* v. *Rhodes*, 416 U.S. at 247.

As demonstrated, Terry does not qualify for the quasi-judicial absolute immunity delineated in *Butz*. We must inquire if she was entitled to absolute immunity on some other ground.

Absolute immunity is accorded only to those public officials "whose special functions or constitutional sta-

tus requires complete protection from suit." *Harlow*, 102 S.Ct. at 2732. These are members of the legislature and judiciary performing their characteristic functions, and the President of the United States. *See id.* at 2732-33.

For executive officials other than the President, the Supreme Court has extended absolute immunity to those playing an integral part in judge-supervised trials or in closely analogous proceedings. *See id.* at 2733 (citing *Butz*, 438 U.S. at 508-17); *Briscoe* v. *LaHue*, 51 U.S.L.W. at 4249-52. It has denied absolute immunity to senior aides to the President, *Harlow*, 102 S. Ct. at 2736, Cabinet members, *see id.* at 2734 (citing *Butz*, 438 U.S. at 506), and state governors, *see Harlow*, 102 S. Ct. at 2733 (citing *Scheuer* v. *Rhodes*, 416 U.S. at 247-48).

Because Terry does not fit within the subcategory of executive officials held absolutely immune in *Butz*, a new category of absolutely immune executive officials would have to be created to exempt her unqualifiedly from liability. New categories are recognized only in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Butz*, 438 U.S. at 507.

A defendant official bears the burden of providing that "public policy requires an exemption of that scope," *id.* at 506, that "the responsibilities of his office embraced a function so sensitive as to require a total shield from liability." *Harlow*, 102 S. Ct. at 273. A court evaluates this possibility by assessing the importance of public policy considerations through "reference to the common law, or more likely, our constitutional heritage and structure." *Id.* at 2736 n.20.

Terry has made only a cursory argument that tax collectors are entitled to an absolute immunity independent of the quasi-judicial immunity recognized in *Butz*. She contends that the duties of an IRS official responsi-

ble for seizing property invite personal retaliation in the form of vexatious damage suits and that absolute immunity is essential if these officials are effectively to conduct the important public business of tax collection.

Police officers, whose important duty to protect the public may involve deprivations of liberty through arrests, are entitled only to qualified immunity, *Scheuer*, 416 U.S. at 245, though their actions would seem equally likely to invite retaliatory suits. Law enforcement personnel executing levies were traditionally not protected by any immunity under the common law. IRS agents are "relatively low-level executive officers" with a correspondingly "narro[w] range of official discretion." *Mark* v. *Groff*, 521 F.2d at 1380-81. *Cf. G.M. Leasing*, 560 F.2d at 1014 (levying is "ministerial" rather than "discretionary" activity).

Other cases addressing IRS agents' damages liability for levy-related activities have chosen the qualified immunity standard. *Hall* v. *United States*, 704 F.2d at 249-50 & n.2; *Hutchinson* v. *United States*, 677 F.2d at 1328; *G.M. Leasing Corp.* v. *United States*, 560 F.2d at 1015.

We recognize the government's interest in collecting taxes. Congress's taxing power is granted by the Constitution, U.S. Const. art. I § 8, cl. 1; amend. XVI. The importance of tax collection is reflected in statutes which, for example, prohibit its injunction. *See* 26 U.S.C. § 7421(a).

But the law reflects also a Congressional determination that the taxpayer should be afforded certain procedural rights, which the IRS is bound to respect. *See, e.g., Laing* v. *United States*, 423 U.S. 161 (1976). In balancing these interests, Congress has determined that violations of the procedural rights at issue here are exceptions to the Anti-Injunction Act. *See* 26 U.S.C. §§ 6213(a), (b)(2), 7421(a).

Private ownership of property and its enjoyment secure from arbitrary governmental interference are cherished, fundamental concepts, *see* U.S. Const. amends. III, IV, V, VIII, X, XIV, and are two of the features distinguishing this society from those with oppressive governments.

Unjustified governmental invasion of property rights by seizure can occasion physical hardship, *see Commissioner* v. *Shapiro*, 424 U.S. 614, 629-30 n.11 (1976), but the affront to the citizen's notions of the place of government in our society, when personally confronting the misuse of its awesome power, may engender a turmoil that is more profound than the physical effects of the deprivation. *Cf. Bivens*, 403 U.S. at 391-92, 394-96.

The Service, with its broad authority including that of levying property, has power that is considerable, and in some ways unique, to disrupt taxpayers' lives. The needs of the public fisc are vital, but their mere invocation cannot override all rights of the public for whom it exists, without reference to the propriety of that invocation.

With the IRS's broad power must come a concomitant responsibility to exercise it within the confines of the law. The Court has emphasized that no official is above the law, and that broad powers present broad opportunities for abuse. *Butz* 438 U.S. at 505-06. *Cf. Mark* v. *Groff*, 521 F.2d at 1380 n.4.

We conclude that agents in Terry's position do not meet the Supreme Court's test for creating new categories of absolutely immune executive officials.

II. QUALIFIED IMMUNITY

The decision below reflects a determination that Terry acted with subjective good faith. However, when it was rendered, officials asserting the qualified immunity defense had to demonstrate that they met an objective standard of good faith as well. *See, e.g., Wood* v. *Strickland*, 420 U.S. 308, 321 (1975). Ignorance or dis-

regard of settled, undisputable law negates this defense even if subjective good faith exists. *Id.*

The Supreme Court has since revised the summary judgment test for qualified immunity, making objective good faith the only requirement. The district court is to place its "[r]eliance on the objective reasonableness of an official's conduct." *Harlow*, 102 S. Ct. at 2739. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Id.* at 2738 (emphasis supplied).

Bothke argues that Terry has not met this standard, because (1) the IRS allegedly did not follow statutory procedures, and (2) he warned Terry twice that she was proceeding illegally. Because of the lower court's disposition on the immunity issue, it did not reach the question whether the IRS proceeded correctly.

For a levy to be statutorily authorized in the circumstances here, two conditions must be fulfilled. First, a 10-day notice of intent to levy must have issued. *See* 26 U.S.C. § 6331(a). Terry ascertained that this had been done. Second, the taxpayer must be liable for the tax. *Id.* Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.

For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *Flora* v. *United States*, 362 U.S. 145, 176 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures.

Bothke believes that the IRS had to follow the deficiency proceedings of 26 U.S.C. §§ 6212, 6213(a), un-

der which he was entitled to a preassessment notice of deficiency which gave him 90 days to petition the Tax Court. Terry argues that the IRS was proceeding properly under an exception to the statutory requirement, whereby no deficiency notice is necessary if the amount assessed is the result of a mathematical or clerical error on the face of the return. *Id.* § 6213(b)(1), (g)(2).

Even under this exception, the regular deficiency-proceeding safeguards are mandatorily triggered if the taxpayer requests an abatement within 60 days. *Id.* § 6213(b)(2). Bothke responded to the IRS's Correction to Arithmetic well within that time.

The IRS failed to construe his protest as a request for abatement because he did not cite this statute. But the notice to Bothke did not suggest that the IRS expected a statutory reference before it would conclude that the the [*sic*] taxpayer's procedural rights under the statute had been triggered. Rather, it indicated that Bothke could challenge the correction merely by "let[ting] us know if you believe that the balance due is incorrect."

More importantly, the statute does not require that the taxpayer put a legal classification on his protest. The Service, however, with its expertise, is obliged to know its own governing statutes and to apply them realistically. Bothke's strongly worded protest should reasonably have been construed as a request for abatement. It seems the IRS proceeded illegally even under its interpretation of the proper procedure to use for his tax return.[4]

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[4] Terry has in the alternative suggested briefly that the procedure used was proper because no determination of a prior notice of deficiency is required when the assessment is based on the return as filed. The authority offered is *Collins* v. *United States*, 45 A.F.T.R. 2d 616 (E.D. Mo. Dec. 3, 1979). In that case, the taxpayers had self-assessed the taxes but failed to pay them. Under the facts here, this argument is frivolous. As the magistrate noted, when Terry's counsel suggested this below,

If Terry had this protest or was aware of its substance, it is questionable whether she can meet the objective good faith standard.[5] This information is not in the record on appeal.[6]

We remand for a determination whether Terry met the *objective* good faith standard. The matter of

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"if you read [Bothke's Form 1040] literally it indicates that the $1,100 should come back to him. It doesn't indicate that he owes anything."

[5] This is not to be read to imply that where the file passed to the field officer masks, either carelessly or systematically, facts pertinent to the legality of the levy, immunity will automatically result. If the field officer has *reasonable* notice of possible irregularities that would make a levy illegal, whether the notice comes by examination of the file or otherwise, the matter must be resolved, if the exercise of discretion to levy is to have a factual basis of adequate scope. This is especially true in a routine case where no jeopardy assessment is involved and the circumstances are not exigent. This follows from an application of good faith immunity standards to the fact that field officer job duties include investigating an account before determining that a levy is warranted.

We recognize that several agents may deal with a case before it reaches the field officer and that any procedural error in these earlier stages are committed by officials other than the one ultimately assigned the account for investigation and levy.

Bothke's March 15 protest to the Correction to Arithmetic exemplifies the sort of thing which, if known to the field officer, would provide reasonable notice of preexisting procedural improprieties. It is the item which, after a review of the record in this case, stands out as raising a genuine issue of Terry's good faith under the objective standard. The district court's findings of her subjective good faith survives the clearly erroneous test.

[6] Terry did have the "Taxpayer Delinquent Account," but we cannot decipher the abbreviations and transaction codes for the items in the printout. The date of one item corresponds approximately with the date the IRS received Bothke's March 15 protest.

Our consideration of this matter was hampered in other ways. The copy of Terry's handwritten "TDA History Record" in the record on appeal is so poorly reproduced as to be partially illegible. We are unable to decipher the numerical codes Terry used. There appears to be an unexplained hiatus on lines 9 and 13.

Bothke's protest to the Correction to Arithmetic and Terry's knowledge of it will be considered.

Bothke is clearly not without fault in the creation of this situation in view of the manner in which he prepared his 1977 tax return. The Service, however, has efficient methods for dealing with such returns. Our decision will not hamper it from pursuing those proper methods in similar situations. *Cf. Fullerton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d at 1078.

III. OTHER ISSUES

Bothke alleges that the district court denied him a jury trial. The court did not do so explicitly; rather, lack of a jury trial was a consequence of granting summary judgment. The magistrate indicated that Bothke would have received a jury trial had the matter gone to trial. This question is not ripe for review.

Our decision, as was the decision below, is limited to the immunity issue. We express not opinion on other matters that might result in an early resolution.[7]

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[7] Terry argues in her opposition to the petition for rehearing that Bothke's complaint failed to state a constitutional claim, despite his allegations of constitutional violations. The rule of absolute official immunity still holds for common-law torts.

Summary collection procedures have been upheld against due process arguments where the taxpayer had an opportunity for a post-seizure notice and hearing. *E.g.*, *Phillips* v. *Commissioner*, 283 U.S. 589, 593-601 (1931); *Bomher* v. *Reagan*, 522 F.2d 1201, 1202 (9th Cir. 1975); *Tavares* v. *United States*, 491 F.2d 725, 726 (9th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *cf. Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972) (summary seizure proper when "*essential* that governmental needs be *immediately* satisfied") (quoting *Phillips*, 283 U.S. at 597) (emphasis by the *Shevin* Court).

However, in those cases the attack was on the procedures themselves, not on acts which allegedly bypassed statutory procedural safeguards as here.

Morever, the Supreme Court has said that in some instances due process concerns may be implicated in tax seizures. *Commissioner* v. *Shapiro*, 424 U.S. 614, 629-32 & nn.11-12 (1976).

CONCLUSION

Our previous disposition is withdrawn. The decision below is reversed insofar as it held defendant Terry absolutely immune. The rest of the judgment is vacated and the case is remanded for a determination whether the defendant met the objective good faith standard and for further proceedings as may be necessary.

The Fifth Circuit has held that in circumstances similar to those here, a cause of action could be implied under the due process clause of the Fifth Amendment. *Seibert* v. *Baptist*, 599 F.2d 743 (5th Cir. 1979), reversing *on rehearing* 594 F.2d 423 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980). The Sixth Circuit appears to have done so. *Hall* v. *United States*, 704 F.2d at 249 n.1.

Moreover, several courts have suggested that though federal officials are absolutely immune from liability for state and common-law torts, they should not be absolutely immune if the plaintiff relies on a cause of action under federal law short of a constitutional claim. *See, e.g., Lawrence* v. *Acree*, 665 F.2d 1319, 1326 & n.11 (D.C. Cir. 1981). *See also Harlow*, 102 S. Ct. at 2738 (good faith immunity in *Bivens* suits applies insofar as conduct does not violate "clearly established *statutory or constitutional rights* of which a reasonable person would have known") (emphasis supplied). Bothke alleges violations of federal statutes that accorded him specific rights.

Another issue, raised but not reached below and not argued on appeal, is whether a *Bivens* action should be barred because Bothke may have had an alternative remedy. *Compare Bivens*, 403 U.S. at 396-97, *to Bush* v. *Lucas*, 51 U.S.L.W. 4752 (U.S. June 13, 1983) *and Carlson* v. *Green*, 446 U.S. 14 (1980).

Terry suggested below that Bothke might have been able to get an injunction under an exception to the prohibition of enjoining tax collection, *see* 26 U.S.C. §§ 6213(a), 6213(b)(2), 7421(a), because the IRS allegedly failed to give him the statutorily required notices. However, cases seem to have limited the preclusion question to whether the plaintiff had available certain alternative retrospective remedies, not whether the plaintiff might have prevented the violation with an injunction sought on the assumption that government officials would act illegally in the future.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5457
DC# CV 80-4450-MML

HANS BOTHKE, PLAINTIFF-APPELLANT,

v.

FLUOR ENGINEERS AND CONSTRUCTORS, INCORPORATED, ET AL., DEFENDANTS,

and

W. J. TERRY, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
District Judge Malcolm M. Lucas, Presiding
[Argued and Submitted December 10, 1982]
[Filed Jan. 24, 1983]

MEMORANDUM

Before: WRIGHT, KENNEDY, and BOOCHEVER, Circuit Judges

Bothke appeals a grant of summary judgment for the defendants Fluor Engineers and Constructors, Inc. and Wendy Terry. He contends that the levy on his wages without a notice of deficiency violated his constitutional rights, and seeks several million dollars in compensatory and punitive damages.

The standard rules concerning summary judgment apply. *Bieghler* v. *Kleppe*, 633 F.2d 531, 533 (9th Cir. 1980). Terry's affidavit shows that she had the authori-

ty to initiate or continue a proceeding subject to agency adjudication. She is absolutely immune from liability. *Stankevitz* v. *IRS*, 640 F.2d 205 (9th Cir. 1981). Because Bothke presented no evidence controverting Terry's affidavit, summary judgment was proper.

The pro se appellant argued effectively that he was sincere in presenting evidence of injury due apparently to errors in the district office of the Internal Revenue Service. His frustration over these errors is understandable. It is clear that he is not and was not at the time in question a tax protester. Unfortunately, however, the case law does not permit recovery.

Even if Terry did not have absolute immunity, she would be protected by qualified immunity from liability. *Butz* v. *Economou*, 438 U.S. 478 (1978). She presented evidence that her actions were taken in good faith and within the scope of her authority. Bothke responded only with conclusionary allegations.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 80-4450-MML (JR)

HANS BOTHKE, PLAINTIFF,

v.

FLUOR ENGINEERS AND CONSTRUCTION INC., SUSAN MEYERS, MICHAEL CASTROGIOVANI, W. J. TERRY, DEFENDANTS.

[FILED APR. 3, 1981]

REPORT AND RECOMMENDATION ON A CIVIL RIGHTS COMPLAINT

This Report and Recommendation is submitted to the Honorable Malcolm M. Lucas, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Plaintiff filed a 1977 Form 1040 with the IRS in which he placed asterisks (instead of dollar amounts) in the boxes designated for wages, interest earned, and business income. Thus, the form contained no information pertaining to his taxable income for the year. Plaintiff did enclose a W-2 form which indicated that $1154.62 had been withheld from his wages and he entered that figure on the Form 1040 as being an overpayment to be refunded to him. On the Form 1040 plaintiff indicated that he objected to questions he did not answer "in accordance with my 1st, 4th, 5th, 8th, 9th and 10th amendment rights."

Defendant is an Internal Revenue Officer. In 1979, in the due course of her duties, she received a Tax Delinquent Account which indicated that Plaintiff was being

assessed in excess of $6,000 in connection with his 1977 Form 1040. Defendant made demand upon Plaintiff but he refused to pay. Defendant then served a Levy of Wages and Salary upon Plaintiff's employer. Plaintiff notified Defendant that he objected to the levy as being in violation of the law. Plaintiff's employer honored the levy and Plaintiff has brought suit in this Court charging Defendant with a violation of his Civil Rights.

Plaintiff contends that since the Form 1040 did not contain a mathematical error nor did it indicate that any taxes were due, he was entitled to a deficiency notice and an opportunity to contest any assessment. Defendant contends that the W-2 form itself was evidence that taxes were due and, therefore, levy was a proper procedure. Defendant, in levying, however, acted solely upon the Tax Delinquent Account, not having seen the Form 1040 prior to the execution of the levy.

Both parties have filed Motions for Summary Judgment. Both parties have submitted declarations or affidavits and Defendants testified at the hearing on the Motions.

If levy was the proper procedure then Plaintiff does not have a cause of action against Defendant. However, it is not necessary to decide whether levy was proper, whether deficiency procedures were proper, or whether both possibilities were proper as Defendant has immunity from libility in this case.

As a federal official, Defendant has, at the very least, a qualified immunity for good faith acts performed within the scope of her authority. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Clifton* v. *Cox*, 549 F.2d 722 (9th Cir. 1977). The decision and power to levy were within Defendant's authority. Based upon the facts presented to her, including Plaintiff's objectons to the levy, and even assuming Plaintiff's view of the tax laws to be correct, Defendant is guilty of no more than a good faith error of judgment and is immune from liability.

Additionally, the recent Ninth Circuit case of *Stankevitz* v. *IRS, ETC.*, 640 F.2d 205 (9th Cir. 1981) (see attached Exhibit A) holds, quoting *Butz, supra*, that IRS agents have an *absolute* immunity if they were "responsible for the decision to initiate or continue a proceeding subject to agency adjudication." Defendant falls within that category.

CONCLUSION

In light of the foregoing discussion, this Magistrate recommends that the Court make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Defendant is an Internal Revenue Officer.

II

Defendant received a taxpayer Delinquency Account which indicated that an assessment of taxes had been made against Plaintiff in connection with his 1977 income tax return.

III

Defendant requested payment from Plaintiff which he refused. Defendant served a Levy on Plaintiff's employer who complied with the Levy.

IV

The Levy by Defendant was performed in the course and scope of her employment and in the good faith belief that it was authorized under the Internal Revenue Code.

V

Any Finding of Fact deemed a Conclusion of Law is hereby incorporated in the Conclusions of Law.

CONCLUSIONS OF LAW

I

This court has jurisdiction of the parties to this action.

II

There is no genuine issue as to any material fact.

III

The Defendant is immune from liability either under the doctrine of qualified immunity or absolute immunity.

IV

Summary judgment should be entered in favor of the Defendant and against the Plaintiff and Plaintiff's Motion for Summary Judgment should be denied.

V

To the extent these Conclusions of Law also contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

DATED: This 3rd day of April, 1981.

/s/ Joseph Reichmann
JOSEPH REICHMANN
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5457
DC# CV 80-4450-MML

HANS BOTHKE, PLAINTIFF-APPELLANT.

v.

FLUOR ENGINEERS AND CONSTRUCTORS, INC., ET AL., DEFENDANTS

and

W. J. TERRY, DEFENDANT-APPELLEE.

APPEAL from the United States Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED IN PART, VACATED IN PART AND REMANDED.

NOTE: BILL OF COSTS ATTACHED, AWARDING appellant HANS BOTHKE costs in the sum of $210.50.

A TRUE COPY
ATTEST

BY: Pat Nametower
PAT NAMETOWER
Deputy Clerk

Filed and entered AUGUST 26, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5457
DC# CV 80-4450-MML

HANS BOTHKE, PLAINTIFF-APPELLANT,

v.

FLUOR ENGINEERS AND CONSTRUCTORS, INC., SUSAN MEYERS, MICHAEL CASTROGIOVANI, AND W. J. TERRY, DEFENDANTS-APPELLEES.

[FILED NOV. 16, 1983]

ORDER DENYING REHEARING

Before: WRIGHT, KENNEDY and BOOCHEVER, Circuit Judges.

The petition by appellee Terry, received by the Clerk on October 11, 1983, seeks rehearing. The petition may be filed and is denied.

/s/ E. A. Wright
E. A. WRIGHT
Circuit Judge

DATE: NOVEMBER 16, 1983

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section. 6213. Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to restrictions on assessment.

(1) Assessments arising out of mathematical or clerical errors.

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax

but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors

(A) Request for abatement.

Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection.

In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

* * * * *

Section 6331. Levy and distraint

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

APPENDIX G

Form 1040 U.S. Individual Income Tax Return 1977

For the year January 1–December 31, 1977, or other taxable year beginning , 1977 ending , 19

Use IRS label. Otherwise, please print or type.

FA 565-90-6893 D95 1
HANS J BOTHKE
400 S FLOWER LL 156
ORANGE CA 92668

Last name

Your social security number: 565 90 6893

For Privacy Act Notice, see page 3 of instructions.

Spouse's social security no.: (NONE)

Your occupation ▶ PIPNG ENGR.

Spouse's ▶

Presidential Election Campaign Fund

Do you want $1 to go to this fund? Yes No

If joint return, does your spouse want $1 to go to this fund? Yes No

Note: Checking "Yes" will not increase your tax or reduce your refund.

Filing Status Check Only One Box

1 • Single
2 Married filing joint return (even if only one had income)
3 Married filing separately. If spouse is also filing, give spouse's social security number in the space above and enter full name here ▶
4 Unmarried Head of Household. Enter qualifying name ▶ See page 7 of instructions
5 Qualifying widow(er) with dependent child (Year spouse died ▶ 19). See page 7 of instructions

Exemptions

Always check the "Yourself" box. Check other boxes if they apply.

6a • Yourself ☐ 65 or over ☐ Blind
b ☐ Spouse ☐ 65 or over ☐ Blind

Enter number of boxes checked on 6a and b ▶ 1

c First names of your dependent children who lived with you ▶

Enter number of children listed ▶ 0

d Other dependents: (1) Name	(2) Relationship	(3) Number of months lived in your home	(4) Did dependent have income of $750 or more?	(5) Did you provide more than one half of the dependent's support?

Enter number of other dependents ▶ 0

7 Total number of exemptions claimed

Add numbers entered in boxes above ▶ 1

Please Attach Copy B of Forms W-2 Here

Income

8	Wages, salaries, tips, and other employee compensation. (Attach Forms W-2. If unavailable, see page 5 of instructions.)	8	••
9	Interest income. (If over $400, attach Schedule B.)	9	••
10a	Dividends (If over $400, attach Schedule B) 10b less exclusion , Balance ▶ (See pages 9 and 17 of instructions)	10c	NONE
	(If you have no other income, skip lines 11 through 20 and go to line 21.)		
11	State and local income tax refunds (does not apply if refund is for year you took standard deduction)	11	NONE
12	Alimony received	12	NONE
13	Business income or (loss) (attach Schedule C)	13	••
14	Capital gain or (loss) (attach Schedule D)	14	NONE
15	50% of capital gain distributions not reported on Schedule D	15	NONE
16	Net gain or (loss) from Supplemental Schedule of Gains and Losses (attach Form 4797)	16	NONE
17	Fully taxable pensions and annuities not reported on Schedule E	17	NONE
18	Pensions, annuities, rents, royalties, partnerships, estates or trusts, etc. (attach Schedule E)	18	NONE
19	Farm income or (loss) (attach Schedule F)	19	NONE
20	Other (state nature and source—see page 9 of instructions) ▶	20	NONE
21	Total income. Add lines 8, 9, and 10c through 20 ▶	21	••

Please Attach Check or Money Order Here

Adjustments to Income *(If none, skip lines 22 through 27 and enter zero on line 28.)*

22	Moving expense (attach Form 3903)	22	NONE	
23	Employee business expenses (attach Form 2106)	23	NONE	
24	Payments to an individual retirement arrangement (from attached Form 5329, Part III)	24	NONE	
25	Payments to a Keogh (H.R. 10) retirement plan	25	NONE	
26	Forfeited interest penalty for premature withdrawal	26	NONE	
27	Alimony paid (see page 11 of instructions)	27	NONE	
28	Total adjustments. Add lines 22 through 27 ▶			28 NONE
29	Subtract line 28 from line 21			29 ••
30	Disability income exclusion (sick pay) (attach Form 2440)			30 ••
31	Adjusted gross income. Subtract line 30 from line 29. Enter here and on line 32. If you want			31 ••

UNITS.

Form 1040 (1977) Page 2

32	Amount from line 31		32	**
33	If you itemize deductions, enter excess itemized deductions from Schedule A, line 41. If you do NOT itemize deductions, enter zero. **Caution:** *If you have unearned income and can be claimed as a dependent on your parent's return, check here* ▶ ☐ *and see page 11 of the Instructions. Also see page 11 of the Instructions if:* ● You are married filing a separate return and your spouse itemizes deductions, OR ● You file Form 4563, OR ● You are a dual-status alien.		33	**
34	Tax Table Income. Subtract line 33 from line 32. **Note:** See Instructions for line 35 on page 11. Then find your tax on the amount on line 34 in the Tax Tables. Enter the tax on line 35. However, if line 34 is more than $20,000 ($40,000 if you checked box 2 or 5) or you have more exemptions than those covered in the Tax Tables for your filing status, use Part I of Schedule TC (Form 1040) to figure your tax. You must also use Schedule TC if you file Schedule G (Form 1040), Income Averaging.		34	**
35	Tax. Check if from ☐ Tax Tables or ☐ Schedule TC		35	**
36	Additional taxes. (See page 12 of Instructions.) Check if from ☐ Form 4970, ☐ Form 4972, ☐ Form 5544, ☐ Form 5405, or ☐ Section 72(m)(5) penalty tax		36	NONE
37	Total. Add lines 35 and 36	▶	37	**
38	Credit for contributions to candidates for public office	38 NONE		
39	Credit for the elderly (attach Schedules R&RP)	39 NONE		
40	Credit for child and dependent care expenses (attach Form 2441)	40 NONE		
41	Investment credit (attach Form 3468)	41 NONE		
42	Foreign tax credit (attach Form 1116)	42 NONE		
43	Work Incentive (WIN) Credit (attach Form 4874)	43 NONE		
44	New jobs credit (attach Form 5884)	44 NONE		
45	See page 12 of Instructions	45 **		
46	Total credits. Add lines 38 through 45		46	**
47	Balance. Subtract line 46 from line 37 and enter difference (but not less than zero)	▶	47	**
48	Self-employment tax (attach Schedule SE)		48	**
49	Minimum tax. Check here ▶ ☐ and attach Form 4625		49	NONE
50	Tax from recomputing prior-year investment credit (attach Form 4255)		50	NONE
51	Social security tax on tip income not reported to employer (attach Form 4137)		51	NONE
52	Uncollected employee social security tax on tips (from Form W-2)		52	NONE
53	Tax on an individual retirement arrangement (attach Form 5329)		53	NONE
54	Total tax. Add lines 47 through 53	▶	54	**
55	Total Federal income tax withheld (attach Forms W-2, W-2G, and W-2P to front)	55 XX 1154.62		
56	1977 estimated tax payments (include amount allowed as credit from 1976 return)	56 none		
57	Earned income credit. If line 31 is under $8,000, see page 2 of Instructions. If eligible, enter child's name ▶ _____	57 **		
58	Amount paid with Form 4868	58 NONE		
59	Excess FICA and RRTA tax withheld (two or more employers)	59 NONE		
60	Credit for Federal tax on special fuels, etc. (attach Form 4136)	60 NONE		
61	Credit from a Regulated Investment Company (attach Form 2439)	61 NONE		
61a	See page 13 of Instructions	61a **		
62	Total. Add lines 55 through 61a	▶	62	**
63	If line 62 is larger than line 54, enter amount OVERPAID	▶	63	XX 1154.62
64	Amount of line 63 to be REFUNDED TO YOU	▶	64	XX 1154.62
65	Amount of line 63 to be credited on 1978 estimated tax	▶ 65 none		
66	If line 54 is larger than line 62, enter BALANCE DUE. Attach check or money order for full amount payable to "Internal Revenue Service." Write social security number on check or money order	▶	66	none
	(Check ▶ ☐ if Form 2210 (2210F) is attached. See page 14 of Instructions.)			

Sign Here & Joint Return

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ _____ APRIL 10, 1978
Your signature Date

▶ _____
Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

▶ Paid preparer's signature and identifying number (see Instructions)

▶ Paid preparer's address (or employer's name, address, and identifying number)

** Object to questions in accordance with my 1st, 4th, 5th, 8th, 9th and 10th amendment rights based on attached Exhibits A, B, C, D, E.

APPENDIX H

Hans Bothke
400 S. Flower LL-156
Orange/CA. 92668

INTERNAL REVENUE SERVICE
PROTEST AND OBJECTION

P.O. Box 12586
Fresno, CA. 93778
Chief, Correspondence Section

I, Hans Bothke, hereby protest and object against the instrument identified as "Document Locator Number 95211-034-41200-9, dated March 5, 1979 on the following grounds:

1. The instrument is not signed, not authenticated, not verified, not trustworthy, not reliable, is not attested to its validity, has not been given the effect of one's act, has no operating effect, and bears no evidence that it was executed, as the courts have ruled:

To sign, to affix one's name to a writing or instrument for the purpose authenticating it, or to give it effect as one's act. *McCall* v. *Textile Industrial Institute*, 189 N.C. 775,128 S.E.349. The act putting down a man's name at the end of an instrument to attest its validity. *Smith* v. *Greenville County*, 188 S.C.349,199 S.E.416,419. To authenticate, means to give verity, to impart to the instrument its validity and operating effect. *Hartley* v. *Ferrel*, 9 Fla. 374,380. The Authentication of a written instrument is such official attestation as will render it legally admissible in evidence *Mayfield* v. *Sears*, 32 N.E.816,133 INd. 86. Authentic, means authoritative, reliable, trustworthy, real, pure, true or genuine. *Woods* v. *Jastremski*, 11 So.2d 4,8,201 La.1092. As a result pursuant to law the forementioned instrument has no operating effect and is null and void.

2. Additional defect in the forementioned instrument is, that some figures show no dollar mark ($). Where the dollar mark has been omitted to show what it meant, it has been held void. *Todd* v. *Rines*, 2N.W. 497,500,26 Minn.201.

3. The above mentioned instrument states: (1) Under Correction to Arithmetic: Based on the Information received we have adjusted your return accordingly; (2) Under identified Code No:01: A penalty has been added because your return was not filed:

In view thereof you have adjusted my return and you have added a penalty because my return was not filed, you have contradicted yourself. I can only conclude that your intention is to deceive me, as I have filed my return, which you have confirmed under (1) above.

4. My original return filed April 10, 1978 with Exhibits A through E and my letter dated August 9, 1978 with attachments, substantiate my position and furnish explanations why I have filed with objections and why the alleged balance due I.R.S. is incorrect. See specifically Exhibit A, Affidavit dated March 24, 1978. Please take again judicial notice; There can be no sanction or penalty imposed upon one because of his exercise of constitutional rights. *Sherar* v. *Cullen*, 481 F.2d 946 (1973).

5. The unexecuted instrument does not contain sufficient information: (1) to substantiate the alleged correct balance of tax in the amount of 6,755.80; (2) on what information was the adjustment of my return based on.

The unexecuted document demonstrates an arbitrary exercise of power under color of law in complete disregard of my constitutional-civil and common law rights, and in complete disregard of your agencies and/or agents legal duty and obligation pursuant to law.

6. I do not waive my right to receive a proper executed instrument from the I.R.S. attested to it's validity. Statutory law requires me to sign every and/or all

documents directed to the I.R.S., an Administrative Agency, Title 5 U.S.C. section 559 of the administrative Procedure Act states: Requirements or Privileges relating to procedure apply equally to agencies and persons; Therefore your unexecuted document directed to me deprived me of the equal protection of the law. The fifth amendment to the U.S. Constitution also guarantees me procedural due process of law. Procedural due process requires a signature on documents to attest to their validity.

In view thereof you have violated my right to due process of law. Government officials are themselves accountable in court for compliance with rule of law applicable to administrative agencies. *Transworld Airlines Inc.* v. *C.A.B.*, 385, F.2d 648,390 U.S. 944, 19 Led 2d 1133.

7. As a result of the issue of this unexecuted instrument by your agency and/or agents I am compelled under duress and fear of waiving my property and fear of statutory penalty; (1) to use my free time to do extensive legal research; (2) to perform some act, specifically to answer your effectless instrument pursuant to law, which deprives me of the exercise of my free will. "Duress" exists when a person is induced by another's unlawful act to perform some act under circumstances depriving him of the exercise of free will *Newsom* v. *Medis*, 239, P.2d 784, 786, 205 Okl.574. *Wolff* v. *Bluhm*, 70 N.W. 73, 74, 95 Wis.257, 60 Am.St.Rep. 115. Duress by government or its officers is defined by the Supreme Court as Moral Duress not justified by law. *Maxwell* v. *Griswold*, 51 U.S.(How.) 242,256,13 Led 405.

In view of the foregoing outlined unlawful actions and conduct by your agency and/or agents, I hereby again request: (1) The guaranty that you comply with the law; (2) The protection of my constitutional, civil and com-

mon law right, which is your agencies and/or agents legal duty and obligation;

That I can file my return without the specifically claimed objections.

Please return the completed Interrogatories (attached) within fifteen (15) days. None compliance with my request will force me to take legal action in court.

Thank you for your cooperation,

respectfully

/s/ Hans Bothke
HANS BOTHKE

Executed this 15th day of March 1979.

cc: with attachment to
Office of Chief Counsel
Internal Revenue Service
Washington, D.C. 20224.

FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

NO: 83-1506

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

W.J.TERRY, Petitioner

v.

HANS BOTHKE, Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

HANS BOTHKE
400 S.Flower #156
Orange, California
92668
Tel: (714) 978-2724
Respondent in pro per.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO: 83-1506

W.J.TERRY, Petitioner

v.

HANS BOTHKE, Respondent

BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI

SUMMARY ARGUMENT

The decision below was in accordance with the body of law upheld and confirmed by courts on all levels covering the complyance of Revenue employees with Section 6213 of the Internal Revenue Code, 1954, 26 U.S.C..

The section prohibits an assessment of a deficiency and levy without the issuance of a statutory notice of deficiency, which is the prerequisite for a redetermination in the U.S.Tax Court.(Writ,App.F) The notice affords the safeguards of due process

requirements secured by the Fifth Amendment to the U.S.Constitution.

The scholarly rendered decision by the court below, Bothke v.Terry, 713 F 2d 1405 does not require extensive reiteration herein and speaks for itself. In addition thereto respondent Bothke submits that a qualified immunity granted to Terry could not be justified under any law or authority based on the facts in the record and would constitute a mockery of justice due to Terry's violations of law during the litigation proceedings alone of which this Court should be informed. Terry committed several times perjury by submitting false statements under oath into the record. Specifically that: "There is a notice*** it showed the correct balance of tax." (RT 1 p 25 L.13) (Exhibit 50,in the record shows that no tax was owed and that Bothke's levied property was returned to him during following litigations.)

"There was an assessment" (RT p.26 L 9&10)
(Exhibit 50 proves to the contrary).
"There was an assessment and that was the tax due on the return." (RT 1 p 24 L 3)
(Bothke's tax return does not show any tax due.(RT 1 p. 7 L 11&18;Writ App.G).
(Terry never saw Bothke's return)(Writ 4a)
Terry's conduct as set forth is in violation of Title 18,U.S.C. Sect.241,242,1001, Sect.7214 (a)(7) 26 U.S.C. Internal Revenue Code.
Furthermore,Terry's submitted declarations under oath were not made on personal knowledge as required pursuant to Rule 56(e) of the Fed.Rule of Civ.Procedure.Terry swore under oath to Bothke's delinquent taxes and alleged existing assessment which did not exist as the record shows.(CR 15 p. 9;CR 25 p.1 & 3;CR 35 p.5)
Terry swore to these matters without having personal knowledge of the same,inspite of her admitted authorized investigating power.

Terry also submitted a fraudulent document into the record,specified as a "Blue Ribbon Certificate of Assessment" to which she swore that it is true and correct in spite of the fact that no assessment existed and that such document has no authority under any section of the Revenue Code.(CR 25 p. 6 & 7;CR 25 p.1)

Additionally Terry failed to answer to the complaint and failed to file opposing papers to Bothke's motions.

She also failed to comply with discovery rules inspite of the District Court's Order to do so.(CR 33,37,41)

These violations were condoned by the District Court inspite of Bothke's strong opposition.(CR 28,34)

The Ninth Circuit failed to address these violations in its decision.

In light of the foregoing violations alone, any type of immunity granted to Terry would constitute a reward for violating undispu-

table established law and thereby would declare the same as null and void by the failure to enforce it.

Terry's admittance that Bothke's protection under Section 6213,26 U.S.C. was violated (Writ p.8,10 & 11) raises no question of law at issue that justifies the grant of a writ of certiorari here.The lower Court's decision is not in conflict with other Court of Appeals and this Supreme Court on the same matters.

FACTS.

Bothke sets forth the salient facts of this case because of inaccuracies and misleading statements in the petition for a writ of certiorari.

1. Bothke's property was levied by Terry without affording Bothke a statutory notice of deficiency pursuant to Section 6213 (a) 26 U.S.C. a prerequisite for a redetermination in the U.S.Tax Court.(writ App.F) Section 6213 (a) states in part:

> "**no levy shall be made,begun or prosecuted until such notice has been mailed to the taxpayer,nor until***if a petition has been filed with the tax court,the decision of the tax court has become final." (writ App.F)

2. Bothke was not afforded the opportunity for a hearing pursuant to the safeguards of procedural due process pursuant to Sect.6213(a)& (b) 26 U.S.C. secured and in harmony with the Fifth Amendment to the U.S.Constitution which states in part:

> "No person shall be***deprived of ** property,without due process of law."

3. Terry failed to state which safeguards she had afforded to Bothke under the due process requirements.

4. Bothke was not afforded an audit,a statutory notice of deficiency nor due process.

5. No statutory assessment existed in Bothke's 1977 tax matters.

6. Bothke's return indicated a refund. (writ p.32a) (Contrary to Terry's statement under oath)(RT 1 p.24 L 3)

7. Terry did not ever see Bothke's return. (Writ p.4a) She proceeded to levy without the return.

8. Terry's duties included to investigate. (Writ p.3,10a,17a)

9. Terry was warned twice by Bothke that she proceeded illegally.(Writ p.15a)

10. Terry played the role of prosecutor, judge,juror and marshal executing the judgment as well.(Writ p.10a)

11. Terry was with the I.R.S. six years at the time of the levy.(Interr.No:2)

12. Terry stated under oath that she was aware of the language of Section 6211, 6212,6213,and 7214 of the Internal Revenue Code,26 U.S.C..(Interr. No:3)

13. Terry acted on her own behalf.(Interr. No: 22)

14. Terry on page No: 2 of her writ states that a notice of correction of arithmetic was sent to Bothke pursuant to 26 U.S.C.,Section 6213(b).(Writ p.2)

An inspection of the notice shows:

(a) No reference to Section 6213(b) is indicated as falsely alleged by Terry.

(b) No alleged error is set forth therein nor any explanation thereof as required pursuant to Sect. 6213(b)(1) which states:

> "Each notice under this paragraph shall set forth the error alleged and an explanation thereof." (writ p.29a)

(c) No indicated time limit within which to respond.

(d) in part: "Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments." (App.A,infra.)

15. Bothke responded promptly as suggested on the notice,without citing any legal classification.(writ App.H).

ARGUMENT.

The legal principles which govern this instant decision have been well established by this court and the federal courts for many years.

The following authorities will be sufficient to establish that the set forth facts are in accordance with the overwhelming weight of judicial authority: Schmidt v. C.I.R.,(CA,9,1959) 272 F 2d 423;American Acceptance Corp. v.U.S.,(CA,9,1977) 550 F 2d 1220; Fendler v.C.I.R.,(CA,9,1971) 441 F 2d 1101;Bromberg v.Ingling,(CA,9,1962) 300 F 2d 859; Stankevitz v.I.R.S.,(CA,9, 1981) 640 F 2d 205.

There can be no dispute that Section 6213,Title 26 U.S.C. is a statute passed by Congress and approved by the president with the built in safeguards of the Fifth Amendment securing procedural due process relative property and federally protected rights.

In light of the herein set forth facts and law,Terry's argument that she did not violate clearly established constitutional and statutory rights of Bothke (writ p.7 & I)when in fact Terry levied Bothke's property without procedural due process,and

her plea that the violation of a statutory right is not sufficient to abrogate an officials immunity to a constitutional damage action is so palpably bad and frivolous that one should asked himself, why do laws exist if they are not enforced, especially against government employees?

The U.S.Supreme Court has already expounded the law relative statutory and constitutional rights in U.S.v.Lee, 106 U.S. 196 quoted in Butz v.Economou, 438 U.S.478(1978) by stating:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defyance, with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are to obey it. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases; Statutes which have been passed by both branches of congress and approved by the president, that the courts can not give remedy when the citizen has been deprived of his property by force, his estate seized** without any lawfull authority, without any due process of law and without compensation, because his officers are in possession? If such be the law of

this country,it sanctions tyranny which has no existence in any government which has just claim to well regulated liberty and the protection of personal rights."

Also in Bell v.Hood,327 U.S.678(1946)

the U.S.Supreme Court had established:

"Where federally protected rights have been invaded;it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The decision below,scholarly has followed the law of the land in harmony with previous rendered decisions of this court by being alert and give remedy to Bothke for invasion of federally protected rights.

On page two of her writ,Terry states that a notice of correction of arithmetic was sent to Bothke pursuant to 26 U.S.C., Section 6213(b).

To prove that this statement is false,we only have to look at the facts No: 14 and 15,supra.These facts demonstrate clearly Terry's employed trickery and deceit before this Court,as the notice sent to Bothke bears none of the requirements of

Section 6213(b) as claimed by Terry.The notice is clearly a spurious document,as it failes to show any legal classification, time limit within to respond,set forth error and explanation thereof.(APP.A)

Terry's shortcommings and false statements were readily recognized and exposed by the lower court in its decision at page 15a and 16a (writ) putting Terry's expertise,the obligation to know her own governing statutes and to apply them realistically,to a test which she miserably failed.

It must be realized that Terry had free I.R.S.Counsel available to her at all times in addition to her investigating authority.

In light of the fact that ignorance of the law is no excuse,and that the notice is a spurious document without authority under the Internal Revenue Code,it suffices that Terry lied again.

In accordance with the fact that no

statutory assessment existed,notice of deficiency proceedings were mandated in Bothke's case pursuant to Section 6213(a). Accordingly Terry's plea for immunity is unsupported by law and frivolous.

Also Terry's immunity plea under Section 6331(a) is without merit since this Section makes distinctly clear that it can only be applied if a person is liable to pay any tax,(writ App.30a) which Bothke was not as the record shows.

The U.S.Supreme Court recognized in Flanders v.Tweed,16 Wall(US) 504,21 L ed 389,already then:

> "THat a party cannot be held to have acted under color of law or by virtue of an act of Congress which did not confer any authority upon him, or any other person,to perform the act,which is in controversy***." and
>
> "Whenever a person sued sets up a defense that he was an officer or employee of the government acting under color of law,it plainly devolves upon him to show that the law which he invokes authorized the act in question to be done,and that he acted in good faith; But nothing of the kind is shown in this case."

Which is also applicable to this instant case based on the facts in the record as set forth herein.

In Great Northern L.Ins.Co.v.Read,322 U S 47,88L Ed 1121,64 S.Ct.873,the importance of the equal protection of the law was well recognized by stating:

> "With us every official from the Prime Minister down to a tax collector is under the same responsibility for every act done without legal justification as any citizen."

and that:

> "An officer who acts wrongfully is liable in a civil action and cannot claim immunity of the sovereign." Tracy v.Swartwout,10 Pet.(U S)80, 9 L Ed 354.

In light of the set forth authorities and Terry's unauthorized conduct,she can not claim to be held immune and her request for immunity is clearly frivolous and shocking to the senses.

Terry falsely claims that the lower Court determined that administrative actions of her have violated Bothke's rights

and a provision of the Internal Revenue Code.(writ P.I) Simple inspection of page 13a in Terry's writ substantiates the fact that the Ninth Circuit by quoting Mark v. Groff,521 F 2d 1380-81,established:

> "Levying is ministerial rather than discretionary activity."(writ App.28a)

The language in Section 6213 cannot be clearer with its intent as set forth in fact No: 1,supra, and is definately not subject to discretionary action. In Kujich v. Lillie,Mont.260 P 2d 383,389,390, and Anderson v.Gile,172 P 2d 583,586,119 Mont. 182, the courts established that:

> "Defined rule ends discretion,and that discretion denotes absence of hard fast rule."

Section 6213 is a clearly established and defined law not subject to discretion and Terry's claim is again clearly frivolous without merit as it finds no support in law.

Throughout Terry's unsubstantiated ramblings including her submitted Brief

Amicus Curiae, she claims falsely to hold the position of a public official.

A simple inspection of the following authorities establishes that:

> "A plublic official is a person who upon being issued a commission, taking required oath, enters upon, for a fixed tenure, a position called office, where he or she exercises in his or her own right some of the attributes of sovereign he or she serves for the benefit of public." Macey v. Heverin, 408 A 2d 1067, 1069, 44 Md App. 358,

and the "Public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 86 S.Ct. 669, 383 U S 75, 15 L Ed 2d 597,

and "Those employees who occupy position in government which have such apparent importance, that public has independent interest in the qualification and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." A.S. Abell Co. v. Barnes, 265 A 2d 207, 214, 218, 258 Md 56.

In light of the above definitions of a Public Official, it is obvious that Terry as an established low level I.R.S. employee

by the lower court (writ p.13a) she certainly does not qualify for the position of a "Public Official",as claimed.

In light thereof Terry's submitted claim,unsubstantiated,in her writ and the submitted Brief Amicus Curiae presenting her defense as a public official on page 2,6,7,8,10,11,12,13,18,20,21,22,24 and 29 is clearly again frivolous and finds no support in law.

Terry also claims in her writ on page 8 and 10 that the lower Court's decision may force I.R.S.employees to litigate a constitutional damage suit like this instant one. The facts in this instant case show to the contrary. The government by and through its attorneys litigated for Terry free of cost to her,paid out of taxpayers funds. Also the Bill of Costs awarded to Bothke against Terry was arranged by Terry through conspiracy with the attorneys of the U.S.Department of Justice

to be paid out of the U.S.Treasury, taxpayer's funds, in complete disregard of the Ninth Circuit's order. Bothke by motion strongly objected to such unlawful and unauthorized conduct to the lower court. (Motion pending).

It becomes obvious that by condoning such unlawfull arrangements by the Department of Justice(?) there exists no incentive for I.R.S.employees to comply and to obey the law , which constitutes disobedience against this very Courts established doctrine as set forth herein.

> "If collectors***and other revenue officers did nothing more than the law authorized them to do,neither they nor the government would be liable in damages;while,if they acted illegally they would be personally liable in damages,not the government."U.S.v.Cumming,Ct.Cl. 9 S.Ct. 583,130 U S 452,32 L Ed 1029.

This was also enforced by the 2nd Circuit stating:"Liability under Civil Rights Act for damages is entitrely personal in nature and is intended to be satisfied out of individuals own pocket." Sostre v.McGinnis,(CA,2,1971)442 F 2d 178,cert.den.404 U S 1049,30 L.Ed 2d 740,92 S.Ct.719,cert.den.405 U S 978.

On page 8,9,and 10 of her writ,Terry begs,inspite of her expertise based on received special training to deal with the complexities of the Code provision,(p.9) for immunity by implying that the lower court's decision transforms the Code into a minefield,(p.8)wherein she labors at her own risk. How pittyful her special trained position is compared to million of taxpayers who tip-toe every year untrained through this complex minefield,the Revenue Code, at their own risk,many financial penalized, based on countless court records,without having the benefit to claim any immunity. (See levied penalty against Bothke in App.A,without liability.)

Terry's plea for immunity in light of her duty and obligation towards Bothke,to obey Section 6213 and its intent,26 U.S.C. a clearly established,undisputable statutory and constitutional right,in complete harmony with the due process safeguards se-

cured under the Fifth Amendment,is incomprehensible and clearly frivolous,due to the fact that she was warned and in view of the fact that she knew.(See Facts No: 9,10,11,12 and 13.supra.)

Terry's cited authorities,to mention only a few: Butz v.Economou,supra,Harlow v.Fitzgerald,457 U S 800,Stankevitz v.I.R.S., 640 F 2d 205 and Wood v.Strickland, 420 U S 308, fly right back into her face as these authorities do not support her claimed position,but support Bothke's beyond any doubt based on the facts in the record;Which constitute no defense at all but merely irrelevant ramblings.

Terry states that the mere violation of a provision of the Internal Revenue Code was an error(writ p.7 & 8) ,when in fact she was warned twice by Bothke and knowingly and willfully deprived Bothke of his property without due process of law by playing the role of prosecutor,judge,

juror and marshal, established by the lower Court in its decision. Terry failed to correct the inefficiencies complained of by Bothke, which the court in Butz, supra, established as willful conduct.

Again, taxpayers are penalized for disregarding and mere violations of Code provisions, liberally applied by persons like Terry.

Terry failed to state that Bothke in protection of his property rights, based on Terry's illegal levy, was compelled to resign from his 12 year employment and suffered loss of fifteen months in wages, before finding new employment, lost benefits, financial hardship and was compelled to initiate three lawsuits to the appellate level for the return of his rightfully earned property. In addition Bothke suffered a totally disrupted life, due to studying, writing, typing of numerous legal documents, mental distress for over four years

without free counsel being paid for out of taxpayers funds,caused by Terry's irresponsible unlawful and unreasonable conduct.

This Court is respectfully requested to take judicial notice of the case Bothke v. Racca,82-5285 (CA9,1982) pending,collateral to this instant case,wherein the defendant Racca,a revenue employee,is sued for the same issues and facts as in this instant case. Therein the defendant Racca,also inspite of being warned by Bothke,filed a lien on Bothke's property during an Audit proceeding,for the balance of Terry's demand from Bothke,which she did not get due to Bothke resigning from his employment.

Yes,the Court read correctly! The lien by Racca was knowingly executed during an audit proceeding.

This type of ruthless and willful conduct by revenue employees explains in part Terry's advisement to this Court,on page 9 of

her writ, that allegedly 547 damage actions are pending against I.R.S. employees. The Court should also notice the fact that Racca works out of the same office like Terry does, and outdid even Terry subsequent she was held immune by the District Court.

Conducts like Terry's and Racca's in conjunction with a reversal of the lower Court's decision in this instant case would really stand the constitution on its head and declare Bothke's rights thereunder as null and void, to which no court has authority to do so.

The decision in the Brief of Amicus Curiae submitted by Terry clearly is in part irrelevant to this case, based on the position of a public official and violations of only regulatory guidelines as set forth therein, inapplicable to these issues herein above; But the decision therein supports strongly Bothke's position in so far

that the decision of the court therein did not even tolerate the regulatory guidelines violation by a public offical.

Particularly Wood v.Strickland,supra,supports Bothke by stating:

> "If the law was clearly etsablished the immunity defense should fail even with public officials,we provide no license to lawless conduct, and a person who suffers injury caused by such conduct may have cause of action":(at 411) and
> "Subject good faith a question of fact requiring resolution by jury is not to be decided on motion for summary judgment. (at 411).

Bothke's complaint was dismissed by summary judgment as the record shows in contradiction with Wood v.Strickland,supra,which scholarly the lower court recognized in its decision by remanding the case to the District Court.

The fallacy in Terry's defense is also demonstrated by the well established and well stated decision in Oliver Wendell Holmes,Autocrat at the Breakfast Table, p. 4 (1900) that: "There is nothing like

facts to ruin even a perfectly good argument." The Opinion of Justice Brandeis in Olmstead v.U.S.,227 U S 438,483,48 S.Ct. 564,574,72 L Ed 944 (1928) presents a proper closing to this argument by stating:

> "Decency,security and liberty,alike demand that government officials shall be subject to the same rules of conduct that are command to the citizen.In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.
> Our government is the potent,the omnipresent teacher,for good or for ill,it teaches the whole people by its example.
> Crime is contagious.If the government becomes a lawbreaker,it breeds contempt for the law;it invites every man to become a law unto himself; it invites anarchy.
> To declare that in the administration of the criminal law the end justifies the means*** would bring terrible retribution.
> Against that pernicious doctrine this Court should resolutely set its face."

CONCLUSION.

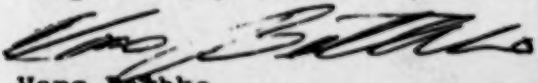
It is respectfully submitted that petitioner has wholly failed to sustain her burden of establishing under Section 6213,26 U.S.C. and 7214 and the Fifth Amendment

that there are special and important reasons why the writ should be granted.

The decision below did not involve an important question of federal law which has not been settled by this court, nor has the court of appeals decided a federal question in a way to conflict with applicable decisions of this Court or other Court of Appeals on the same matter.

The petitioner's Writ for Certiorari is based on the facts in the record clearly frivolous and this Court should award Bothke $ 500.00 Cost for being compelled unjustly to respond to the unjustified petition meritless in fact and law, and wasting this honorable Court's valuable time.

Respectfully submitted,



April 6, 1984. Hans Bothke,
Respondent in pro per.

APPENDIX A

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE CENTER
P.O.BOX 12586

HANS BOTHKE
400 S.Flower LL 156
Orange CA.92668

MARCH 5,1979

CORRECTION TO ARITHMETIC TAX STATEMENT

In checking the arithmetic on your income tax return, we had to make corrections for the reasons shown below.

Tax withheld 1,154.62

BASED ON THE INFORMATION RECEIVED, WE HAVE ADJUSTED YOUR RETURN ACCORDINGLY.

Balance Due I.R.S. $ 6,177.87

Penalty: 280.06 Interest: 296.63

Code number 01
A penalty has been added because your return was not filed and your tax was not paid when due.

Code number o9
Interest as provided by law is figured from the due date of the return to the date of full payment or the date of this notice.
Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments.Just return this notice with the correct payment and an explanation to account for the difference.
If you write,please return this notice to help us identify your account.*

This notice is not the result of an examination of your return. We notify the taxpayer when we select a return for examination.

Office - Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS
CLERK

NO: 83-1506

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

W.J.TERRY, Petitioner,

v.

HANS BOTHKE, Respondent.

BOTHKE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HANS BOTHKE
400 S.Flower #156
Orange ,Calif.92668
Tel:(714)978-2724
Respondent in pro per.

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STATUTE:

Title 28 U.S.C. Section 2006....5,6,7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO: 83-1506

W.J.TERRY, Petitioner

v.

HANS BOTHKE, Respondent.

BOTHKE's SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT.

Bothke, respondent, files hereby his supplemental brief pursuant to Rule 22.6 of this Court in opposition to the petition for writ of certiorari, calling attention to the intervening matter that the U.S. Treasury paid Terry's costs taxed against her in the Ninth Circuit of Appeals, not available at the time when Bothke filed his timely Brief in opposition to the petition for certiorari.

This supplemental brief is supported with the herein set forth Memorandum of Points and authorities,Appendix A,B and C and Bothke's Declaration attached.

The Original Check No: 385,000 in the sum of 210.50 is enclosed for the Court to return the same to the U.S.Treasury or subject to this Court's final decision in this instant matter.

MEMORANDUM OF POINTS AND AUTHORITIES.

This Court's attention and authority in it's decision making process is urgently required to resolve the matter of Terry's liability and conduct in this instant case in conjunction with the forthcomming decision in this case and previous established doctrine as set forth herein-after.

Terry had arranged in cooperation with her counsels in the Department of Justice that the taxed costs against her in the sum of $210.50,certified and approved by the Ninth Circuit,(App.A & B) be paid out of

Taxpayer's funds, the U.S.Treasury.
See Original Check attached No: 385,000
or a true copy thereof in Appendix C.

Terry's action in conjunction with her counsels of record, do not find any support in law and constitute an obstruction of justice.

An inspection of Terry's petition on page 8 and 10 demonstrates her false allegation before this honorable Court, by stating therein that the decision below suggests that Terry may be forced to litigate and be subject to the cost of a trial.

The record shows to the contrary, specifically that Terry received a free of charge defense and that the taxed bill of costs against her was also paid out of taxpayer's funds, proving her allegations to be false and frivolous.

The facts in this instant case establish the following: (1) The Bill of Costs is taxed against Terry; (App.A & B) (2) Terry by and through her counsels of record arran-

ged unlawfully for the U.S.Treasury to pay the taxed costs for her;(App.C) and (3) Terry was provided with a free defense paid out of taxpayers funds for violating established laws.(Entire record.)

Bothke strongly objected against these unlawfull missappropriations of taxpayers funds by motion filed with the Ninth Circuit.

Without legal authority,the clerk of the lower Court returned the government's check to Bothke,by alleging it to be by the order of the Court,and also notified Bothke therein that the motion will be lodged but not filed.(App.D)

An inspection of this spurious order(App.D) reveals the extraordinary legal irregularities: (a) The order is not signed by the Court;(b) The order is signed by the clerk, when in fact and law the clerk has no authority by law to sign orders of the Court; (c) The order states that the motion is

lodged but not filed, denying thereby to Bothke the fundamental right to be heard and depriving Bothke of procedural due process and justice; and (d) the spurious order implies the clerk's authority to allow the government's check to satisfy the jusgment for costs, contrary to established law and doctrine by this court.

Additional facts in the record which must be considered are: (e) this action is and was not brought against the United States, because the United States did not injure Bothke, but Terry did; (f) Terry is being sued in her individual capacity; and (g) No certificate was issued on Terry's behalf by any Court pursuant to 28 U.S.C. Section 2006, which is mandatory and a prerequisite for the Treasury to pay her costs and litigation.

Section 2006 states:

> "Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts,

or for the recovery of any monies exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the Court certifies that:
(1) Probable cause existed;or
(2) The officer acted under the direction of the Secretary of the Treasury or other proper government officer."
"When such certificate has been issued,the amount of the judgment shall be paid out of the proper appropriation by the Treasury."

The record shows that Terry in her interrogatories No: 22,stated that she acted on her own behalf.(Opposition p.7 and fact No: 13)

No certificate was issued on her behalf that probable cause existed for her unlawful conduct,pursuant to 28 U.S.C.,Section 2006,which is obvious based on her role as prosecutor,judge,juror and marshall,as determined by the lower court in its decision,wherein she admitted her violation of statutory provisions of the Revenue Code. (Petition,p.10 and 11.)Thereby violating willfully and knowingly constitutional safeguards and due process of law and Bothke's

rights thereunder,as set forth in Bothke's opposition.

The result in U.S.v Cumming (oppos.p.18) and in U.S.vNunnally,316 U.S. 258,86 L.Ed 1455,was drawn in harmony with Section 2006 that a collector was personnally responsible for illegally exacting monies under the claim that they were due as taxes,and that such a "personal"remedy against the collector has always been part of our fiscal administration.This rule has been reaffirmed in an unbroken line of authority.

This set forth doctrine of this honorable Court makes good sense because if not so, there exists no enforcement or incentive for government officers to comply with extablished law,and the law becomes meaningless.

In light of the set forth facts,authorities and legal irregularities by the lower court's clerk,Terry and her counsels of record,additional attention of this Court is desperately required to enforce the established law in harmony with this Court's

own decisions,as set forth herein;and to order the return of the attached Treasury check No: 385,000 to the Treasury;Order Terry to pay the taxed costs based on the lower court's order(App.A & B);and award damages to Bothke against Terry,as this Court deems just and proper,for willful disregard and disobedience of the Court's authority,and to restore thereby the offended dignity and authority of the Courts in this instant case in the interest of justice.

Repsectfully submitted,

Dated: May 6,1984

Hans Bothke,respondent
in pro per.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO: 83-1506

DECLARATION OF HANS BOTHKE

Hans Bothke of Orange, California states as follows:

1. I, am the respondent in pro per, in the above entitled action;
2. The lower Court had taxed costs in the sum of $ 210.50 against Terry; (App.A & B)
3. This action is not against the United States; (Entire record.)
4. Terry was notified by Bothke about her outstanding Bill of Costs, and subsequent notification arranged with her counsels of record of the U.S.Department of Justice for the U.S.Treasury to pay her taxed bill of Costs. (App.C)
5. Subject to this instant action, Terry is defended by the United States free of charge to her.
6. Bothke had submitted to the Ninth Circuit a motion for sanctions against Terry and others for contempt of Court and for conspiracy to defraud the United States;
7. The Ninth Circuit did not rule on Bothke's submitted motion. (App.D)

8. The clerk of the Ninth Circuit returned Bothke's submitted check received from the U.S.Treasury and informed Bothke that the motion is lodged but not filed. (App.D)
9. The alleged Order received by Bothke from the clerk is not signed by the Court,but by the clerk.
10. No certificate pursuant to 28 U.S.C. Section 2006 was issued by any Court on behalf of Terry,authorizing the U. S. Treasury to pay Terry's bill of costs.(entire record.)

I,under penalty of perjury declare pursuant to 28 U.S.C. Section 1746 that the foregoing is true and correct and that I can testify competently to the matters set forth herein,if so required.

Executed this 7th day of may,1984 in the City of Orange.

Hans Bothke,declarant.

APPENDIX A

Judgment December 7,1983-Revised mandate issued with costs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HANS BOTHKE, Plaintiff-Appellant,

v.

FLUOR ENGINEERS AND CONSTRUCTORS,INC., et al., Defendants and
W.J.TERRY, Defendant-Appellee.

No: 81-5457
DC# CV 80-4450-ML

Appeal from the United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United District Court for the Central District of California and was duly submitted.

On Consideration Whereof,It is now here ordered and adjudged by this Court,that the judgment of the said District Court in this Cause be,and hereby is REVERSED IN PART,VACATED IN PART AND REMANDED.

NOTE: BILL OF COSTS ATTACHED,AWARDING, appellant HANS BOTHKE costs in the sum of $ 210.50. Filed and entered January 24,1983.

APPENDIX B

December 1,1983

MEMORANDUM

TO: CLERK WINBERRY

ATTN: Ms. Pat Namekawa,Deputy Clerk

RE: Bothke v.Fluor Engineers & Constructors - 81-5457

I compute the costs to be taxed at $ 210.50.

Please enter that amount on the form and file.

signature
EUGENE A,WRIGHT
CIRCUIT JUDGE

EAW/ar

APPENDIX D

FILED
APR 09 1984
PHILLIP B.WINBERRY
Clerk,U.S.Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HANS BOTHKE, Plaintiff-Appellant,

v.

FLUOR ENGINEERS AND CONSTRUCTORS,INC., SUSAN MEYERS,MICHAEL CASTROGIOVANI,and W.J.TERRY, Defendants-Appellees.

ORDER NO: 81-5457
DC # 80-4450-MML(JR)

Before: Wright,Kennedy,and Boochever, Circuit Judges.

Mr.Bothke's motion,received by the clerk on March 14,1984,will be lodged with the clerk,but not filed.

The clerk will return to Mr. Bothke the government's check and satisfy the judgment for costs.

April 9,1984

Mr. Bothke,per above order,we return your check in the amount of $ 210.50, Treasury Check No: 385,000.

Phillip B.Winberry,Clerk
U.S.Court of Appeals for
the Ninth Circuit

By signature
Deputy Clerk

JUSTICE

U. S. MARSHAL

WASHINGTON, DISTRICT OF COLUMBIA Check No. 385,000

SYMBOL 8116

81 811 United States Treasury 1631 March 6, 1984

PAY TO THE ORDER OF ***$210and50/100*** DOLLARS

Hans Bothke

VO. NO.

UNITED STATES MARSHALS

⑈385⑈ ⑆000000518⑆ 00385⑈0000⑈

APPENDIX C